RECENT AMERICAN DECISIONS.

Supreme Court of Errors of Connecticut.

HENRY LEWIS ET AL. v. THOMAS McCABE ET AL.

In Connecticut a condition annexed to a sale of goods that the title shall not pass to the vendee until payment of the price, is valid as against the vendee's creditors.

Nor is such condition necessarily rendered invalid as to creditors by the fact that the property is of such a nature that it will be consumed in the use, and that the vendee is authorized to dispose of it before payment of the price.

In such case, if the vendee is authorized to dispose of the property *as his own*, the condition for the retention of title by the vendor will be void, but if the vendee is simply authorized to transfer the title of the vendor the condition will be good.

Where the condition for the retention of title by the vendor is express and positive, the court will construe an authority given to the vendee to dispose of the property as simply an authority to transfer the vendor's title.

ERROR to the Common Pleas of Hartford county. Case stated setting forth the following facts:

On June 15th 1880, at New Britain, plaintiffs made to one McAvoy a conditional sale of two and a half barrels of liquors, and on July 9th 1880, a conditional sale of one barrel of liquor. All of said merchandise was immediately placed in McAvoy's possession.

It was an express condition of both said sales that the title to said merchandise should not vest in the said vendee until the merchandise was fully paid for, and until such payments were made the title to said merchandise was to be and remain in said vendors.

On October 9th 1880, said merchandise was attached as the property of McAvoy in a suit brought against him by defendants. At the time of the attachment the two and a half barrels of liquor sold June 15th remained intact. The one barrel sold July 9th had been opened a few days before and a small quantity of liquor drawn therefrom and sold. It was the intention of McAvoy to have paid for all said merchandise on the day after said attachment was made, when the agent of plaintiffs was expected to be in New Britain.

Said McAvoy is a retailer of liquors, and it was supposed by the parties that said merchandise would be used in his business, and in case any of said merchandise should have been sold and consumed before the conditions of sale were complied with, the

vendors could only enforce their condition against such portion thereof as might remain unsold.

No payments had been made upon the merchandise at the time of the attachment. Plaintiffs made a demand on the officer serving the attachment to return the goods, and also requested defendants to pay the amounts unpaid thereon, but both of these requests were refused.

If the condition attached to the sales of said merchandise was valid and operative in law, judgment to be rendered for the return of said merchandise, otherwise for the defendants.

The court below entered judgment for defendants, whereupon plaintiffs took this writ of error.

Mitchell & Hungerford, for plaintiffs.

John Walsh, for defendant.

The opinion of the court was delivered by

LOOMIS, J.—There is much contrariety of reasoning and decision relative to the validity of what are called conditional sales in different states, and often to some extent in the same state.

The courts of Pennsylvania have most firmly established the rule that a sale and delivery of personal property, with an agreement that the ownership shall remain in the vendor until the purchase-money is paid, is fraudulent and void as to creditors of the vendee and innocent purchasers; but they are obliged to except cases of bailment where no present contract of sale is regarded as made, and they have often found difficulty in distinguishing between cases that lie near the border line separating sales from bailments, where there is a condition upon which the bailee may become the owner. See *Statfield* v. *Huntsman*, 10 W. N. C. 216; *Brunswick* v. *Hoover*, Id. 219, and cases there cited.

The courts of New York seem to concur with those of Pennsylvania in holding conditional sales void as to purchasers: *Steelyards* v. *Singer*, 2 Hilton 96; *Smith* v. *Lynes*, 1 Seld. 41; *Haggerty* v. *Palmer*, 6 Johns. Ch. 437; but differ by giving effect to them against levies made by creditors and assignments in trust, or as security for the payment of antecedent debts: *Haggerty* v. *Palmer*, and *Smith* v. *Lynes*, *supra*; *Keeler* v. *Field*, 1 Paige 312; *Herring* v. *Hoppock*, 15 N. Y. 409; *Beaver* v. *Lane*, 6 Duer 232; *Wait* v. *Green*, 35 Barb. 585. But where the agree-

ment confers on the conditional vendee the right to sell, or a right inconsistent with continued ownership of the original vendor, the courts of New York pronounce the transaction fraudulent as against both creditors and purchasers: *Ludden* v. *Hazen*, 31 Barb. 650; *Bonesteel* v. *Flack*, 41 Id. 435; *Powell* v. *Preston*, 1 Hun 513. In Maine, Vermont and Massachusetts the condition that the right of property shall remain in the vendor until payment, is held good not only as between the original parties, but also against purchasers from the vendee, and creditors of the latter, even when possession goes with the sale, and there is nothing to indicate that it was not absolute.

In all the cases of this class that have hitherto been considered by this court, the court has uniformly and consistently applied the principle embodied in the ancient maxim "that when a man hath a thing he may condition with it as he will:" 1 Shep. Touch., p. 118.

In the leading case of *Forbes* v. *Marsh*, 15 Conn. 384, WILLIAMS, C. J., in delivering the opinion, cited several cases decided by the courts of Massachusetts, and added: "It is claimed, however, that these and many other cases of a similar character, are peculiar to that state. The court think otherwise, and that they are based upon the principle of the common law, which construes contracts according to the intention of the parties, and allows men to contract according to their own pleasure, unless contrary to the policy of the law or certain technical rules. The owner may dispose of his property to whomsoever he pleases at any time and in any manner: 2 Black. Com. 447. When he relies upon his remedy, it is but just that he should be left to it according to his agreement; but, on the contrary, there is no reason why a man should be forced to trust where he never meant it: HOLT, C. J., in *Thorpe* v. *Thorpe*, 1 Salk. 171. For the agreement of the minds of the parties is the only thing the law respects in contracts: Plowd. C. 140." * * * "The rule of law making the property of one man liable for the debts of others in whose hands it is found, is applicable particularly to that property which was once owned by the possessor, and is by him sold or mortgaged to another, and then suffered to remain in his possession. In such cases possession is evidence of fraud, because there is not given to the world the usual evidence of a change of title. The vendor, or mortgagor, is therefore presumed to remain owner of the pro-

perty as theretofore. It is otherwise in cases like that before us. The vendee comes into possession of property which was known to belong to another man. Whether, therefore, the vendee had borrowed it or hired it or purchased it, becomes a matter of inquiry, and ought to be ascertained by him who proposes to trust his property upon the faith of this appearance; for the law offers its protecting shield to those who attempt to protect themselves. Accordingly we find that all these cases of conditional sales made *bona fide* have been held good as against attaching creditors as well as against the parties." This case and its doctrine have been re-affirmed in *Cragin* v. *Coe*, 29 Conn. 51; *Hart* v. *Carpenter*, 24 Id. 427; *Tomlinson* v. *Roberts*, 25 Id. 477; *Hughes* v. *Kelly*, 40 Id. 148, and *Brown* v. *Fitch*, 43 Id. 512.

But it must be observed that these cases, while firmly sustaining the condition and protecting the title of the original vendor against all other parties, do not directly involve the precise question now presented. Those cases are all distinguishable from this in two particulars—the property was of a nature not necessarily to be consumed in the use; and there was no sort of concession on the part of the original vendor that the conditional vendee might dispose of the property without first paying the price agreed upon. Both these elements, to some extent at least, exist in the present case, and occasion hesitation on the part of the court as to the validity of the condition as against the creditors of McAvoy.

The finding bearing upon the question is as follows: "It was an express condition of both sales that the title to said merchandise should not vest in the said vendee until the merchandise was fully paid for; and, until such payments were made, the title to said merchandise was to be and remain in said vendors." * * * "Said McAvoy is a retailer of liquors, and it was supposed by the parties that said merchandise would be used in his business; and, in case any of said merchandise should have been sold and consumed before the conditions of sale were complied with, the vendors could only enforce their condition against such portion thereof as might remain unsold."

Under such an agreement, after the property has been attached by creditors, will the law consider it as belonging to the plaintiff or to his conditional vendee, McAvoy?

If we invoke the aid of the courts of other states to give an answer to this question we find decisions of the highest courts

of Maine, Vermont and Massachusetts protecting the title of the original vendor under agreements substantially the same as the one we are considering.

In *Rogers* v. *Whitehouse*, 71 Me. 222, goods were bought by a retail trader upon condition that the property should not vest in him until they were fully paid for, but with an understanding between the parties that they were to go into the store of the conditional purchaser and be sold by him in the regular course of trade; and it was held that they did not pass to the assignee, in insolvency of the latter, for the benefit of his creditors, although the original vendor would have been estopped to deny the title of those who might purchase portions of them of the retailer in the regular course of his business; and it was distinctly held that it was not essential to the existence and validity of such a condition that the conditional vendor should have no right to sell to others. BARROWS, J., in giving the opinion, said: "We see no legal objection to a wholesale dealer making a conditional sale to a retailer with the understanding that he may dispose of the goods as they may be called for at retail, but that, as between themselves, the property shall not pass until the goods are paid for; and, in such case, while the purchaser at retail would get a title which the original vendor could not impeach because of his agreement with the retailer, it would be the title of the original vendor, and not that of the retailer, who has none, and can convey none, except in the manner which his arrangement with the vendor permits."

In *Armington* v. *Houston*, 38 Vt. 448, the plaintiff sold one Thompson provisions on a condition made in good faith that they were to remain the property of the plaintiff until paid for, but with the understanding that Thompson might consume them in his family. The defendant, a constable, attached the provisions in behalf of a creditor of Thompson. Held, that the condition was valid, and the title to the goods remained in the plaintiff until they were paid for or consumed. KELLOGG, J., in delivering the opinion of the court said: "It was the unquestionable right of the plaintiff to sell this property to Thompson upon the condition that, until payment of the price, the property should remain the plaintiff's. The retention of the title to the property is not a fraud upon any person, and such a contract is one which every person has a right to make. In a conditional sale, the

possession of the property is ordinarily transferred to the vendee, and very frequently with expectation of both of the parties to the sale that the property will be used by the vendee; but, in such cases, the vendee is, until the performance of the condition, only a bailee of the property for a specific purpose, and he acquires no property in the goods from the possession merely. This right rests upon the agreement of the parties, and their intention in making the contract of sale is to be carried into effect, if the transaction was entered into in good faith, unless the contract is one which contravenes some established rule of law."

Of the Massachusetts cases, the one most in point is *Burbank* v. *Crooker & another*, 7 Gray 158, where there was a sale and delivery of a stock of goods to a shopkeeper to be put into his shop for sale, but upon condition that the title should not vest in him until payment of the price, and it was held that the title did not pass, and the condition was operative as against even a purchaser from him of the whole stock of goods; although it was also held that had a sale been made of individual articles in the ordinary course of business in a country store, the plaintiff might have been estopped to assert any right adverse to such purchaser, having placed them in the hands of such dealer with the understanding that they were to be thus used.

The New York cases already referred to render it probable that the courts of that state would declare such a condition inoperative, although there is a distinction of some significance between the case of *Ludden* v. *Hazen*, *supra*, on which the defendant relies, and the case at bar, in this—that in the former, the vendee, to use the language of the court, was to "run his unlicensed grocery upon borrowed whiskey," all of which, by the terms of the agreement, was to be paid for only when sold, showing that a sale by the grocery man was the most prominent part of the contract. In so flagrant a case, it might well be held that the condition was colorable, fraudulent and void. We concede, however, that the reasoning contained in the opinion renders it probable that the contract we are considering would in that state be declared void against purchasers and creditors.

The finding in the case now under consideration leaves it a little in doubt how far the parties contemplated any use of the liquors in McAvoy's business until paid for by him, and it appears that, although the latter had had possession for several months, yet all

the packages remained intact except one, which was opened, and a small quantity drawn therefrom a day or two before the attachment, and on the day after the attachment full payment was intended to be made to the agent, who was then expected in New Britain.

But conceding that the parties actually contemplated that there might be some sales made before actual payment of the price, yet the terms of the agreement, coupled with the conduct of the conditional vendee in pursuance of it, evince the perfect good faith and *bona fide* character of the transaction, so that it cannot be pronounced void on account of any wrong intent of the parties. If, therefore, the condition is to be held inoperative at all, the law must so declare it upon grounds of public policy, because it was calculated to give the one clothed with the possession a false credit, or else upon the ground that the plaintiffs, through their contract, are to be regarded as holding the possessor or conditional vendee out to the world as absolute owner.

The objection as to giving a false credit has undoubtedly much force, so that in several states the courts consider it as sufficient, but it applies with more or less strength, according to the circumstances, to all cases of conditional sales where the vendee is clothed with full possession and apparent ownership, but as the court says, in *Forbes* v. *Marsh*, *supra*, in this state, "all these cases of conditional sales made *bona fide* have been held good against attaching creditors;" and in reply to the objection we are considering, it warns persons against putting faith in appearances, except where the case comes within the rule of the vendor's retaining possession after the sale, and persons about to give credit on the faith of such appearances must make inquiry. In this respect the language of our courts is similar to that of CAMPBELL, J., in giving the opinion in *Ketchum & Cummings* v. *Brennan*, 53 Miss. 596. "A buyer must beware of purchasing from one who has not title; possession is not title."

The other objection, as to holding out the possessor to the world as absolute owner, is involved partly in the one just considered, except so far as the contract in question must be construed as contemplating or authorizing a sale by the possessor.

Possession, with the *jus disponendi*, added, has been regarded by many courts as a sufficient reason for declaring a contract colorable and fraudulent, without regard to the real intent of the

parties: Bump on Fraudulent Conveyances, p. 123, and cases there referred to.

We concede that there is much force in the reasoning supporting such a rule, but at the same time we must bear in mind the spirit and drift of our own decisions, as they may have induced the making of such contracts. While it is true, as already stated, that no case identical with the present in the particular feature we are now considering has hitherto been before this court, yet the cases referred to clearly show that the controlling consideration has been the *bona fide* character of the transaction and the honest meaning and intent of the parties, without applying any technical rule of public policy, as in the case of a retention of possession by the vendor after a sale.

The courts of Massachusetts and Connecticut have always been in harmony on this vexed subject, and the principles hitherto adopted by us, if they do not logically compel, yet very naturally lead, to the same result as already reached in that state, where the title of the original vendor has been protected, notwithstanding the objection we are considering.

If, however, the contract in question must be construed to mean that the plaintiff authorized McAvoy to sell the property as his own, we should be constrained to hold it so absolutely inconsistent with the retention of the title in the plaintiff as to waive or make void the condition. But in this case the condition that no title was to pass until payment is so clear, express and positive in its terms, that we are inclined to give it full effect, and to construe what is afterwards said of the understanding of the parties relative to a sale, as the court in *Rogers* v. *Whitehouse*, *supra*, did, that is, the authority is not to sell as his own (having nothing himself), but simply to transfer the title of the plaintiff in the manner authorized.

There was error in the judgment complained of, and it is reversed.

CARPENTER, J., dissented.

It is proposed briefly to consider the law with regard to transactions on the border line between bailments and sale; transactions which are growing daily more frequent and various. The questions arising out of them must ever be of the greatest importance, not only to buyer and seller or bailor and bailee, but to third persons, second purchasers and creditors, whose rights depend so largely upon those of the original parties. The subject has lately been brought

prominently to the notice of the profession by the two decisions of the Supreme Court of Pennsylvania, referred to in the principal case, viz.: *Brunswick* v. *Hoover*, 10 Weekly Notes Cases 219, and *Stadfeldt* v. *Huntsman*, Id. 216. The law of the state, upon this point, where these two cases arise is of early origin, and may be said to begin with the case of *Murgatroyd* v. *Crawford*, 2 Yeates 420; 3 Dall. 491. An action was brought upon a policy of insurance of the ship "Mount Vernon." The facts, as stated in the charge of Judge SHIPPEN, as reported in Dallas, were as follows: An Englishman, Duncanson by name, had come here to settle, and taken the oath of allegiance to Pennsylvania, but had not been long enough in the country to entitle him to naturalization. He applied to Messrs. Willis and Francis to get him a vessel with which to trade with India, private trade with that country being prohibited in England as an infringement of the government monopoly. Messrs. Willis and Francis purchased the "Mount Vernon," and a bill of sale was made out to them by plaintiff. It then occurred to Duncanson, that as he had not yet acquired American citizenship, he was not in a position to trade as he wished with safety. Hence, the bill of sale was sent back, and a new contract entered into substantially as follows: The plaintiff should remain the owner of the ship, and as such retain the register and make the insurance; she should, however, be delivered to Duncanson or his agents, and the plaintiff should empower a passenger on her to assign and transfer the ship to Duncanson in England, on September 1st, by which time he would be an American citizen. Purchase-money to be secured by notes of Willis and Francis, payable at all events, in instalments. The present insurance was effected by plaintiff as owner of the ship. In Yeates, Judge SHIPPEN is reported as saying, "Either a delivery of a chattel contracted for, or payment of the consideration money will effect a change of property, where such is the intention of the parties; but where the parties do not contemplate such a change, but expressly guard against it by contract, it would seem strange that the property should pass from the one to the other contrary to the declared will of both." The crucial point in the case, however, was whether or not the arrangement was an evasion of a certain United States statute. In *Murgatroyd* v. *Crawford*, it was held not to be such an evasion. But in *Murgatroyd* v. *McLure*, 4 Dall. 342, Justice CHASE of the United States Circuit Court arrived at an opposite conclusion, and in *Duncanson* v. *McLure*, 4 Dall. 308, the judges retracted their opinion in *Murgatroyd* v. *Crawford* with regard to the statute; but they did not impugn the correctness of their position as to the general law governing such contracts.

The case of *Martin* v. *Mathiot*, 14 S. & R. 214, may be considered the leading case in Pennsylvania on the subject. It was decided, some thirty years later than the last-mentioned case and the conclusion reached was different. The case was this: Martin brought trespass against Mathiot, sheriff, for seizing four wagon horses. The defendant justified the seizure under a *fi. fa.* commanding him to levy a certain debt upon the property of one Michael. The question was whether the property was Martin's or Michael's. It was proved that the horses were, and had been for some time, in the possession of Michael, who was a wagoner. Before they came into his possession they were the property of the plaintiff. The defendant gave evidence that Michael stood charged on the books of the plaintiff with a debt, amounting to upwards of $60, and that the plaintiff, upon being asked whether Michael was the owner of the horses he was driving, replied that he was, provided he should

pay that debt. The opinion of the court below was, that if vendor and vendee agree that possession shall go to the vendee but the property remain in the vendor until the whole purchase-money is paid, such agreement, as respects creditors and the sheriff, is fraudulent. In affirming the judgment Chief Justice TILGHMAN said: "I cannot say that I perceive any error in the opinion of the Court of Common Pleas. Possession of personal property is the great mark of ownership. It is almost the only index which the world in general has to look to. But there are exceptions. There are certain necessary and lawful contracts by which the owner parts with the possession, and yet fraud cannot be presumed. Such are the contracts of lending and hiring, both very useful, and without which society cannot well exist. * * * No suspicion of fraud can fairly arise where the transaction is in the usual course of business. But the case is very different where it is intended that the property should be apparently in one, while it is in fact in another. This is out of the usual course of business, unnecessary, and directly tending to the injury of those who are not in the secret. * * * All the world had a right to suppose that he [Michael] was the owner of the team which he drove, and a secret agreement to the contrary was a fraud upon society, by giving the wagoner a false credit which might induce others to trust him with their property. The cases which have generally been brought before the courts of justice are those in which the seller has remained in possession; I will refer particularly to *Clow* v. *Woods* and *Babb* v. *Clemson*. * * * The principle which governed them was that a sale where possession does not accompany and follow it is fraudulent as to creditors. It was the separation of the possession from the property which made the fraud; and the principle applies to the case before us. * * * The mischief is the same—a false credit is given." It will be seen that Judge TILGHMAN regarded the contract as fraudulent in law, and used language very different from that in *Murgatroyd* v. *Crawford;* and the only authorities referred to are *Clow* v. *Woods*, 5 S. & R. 281, and *Babb* v. *Clemson*, 10 Id. 419. *Clow* v. *Woods*, now a leading case, was an action of trespass against the sheriff. The defendant in the execution under which the sheriff made the alleged wrongful sale, had mortgaged the goods sold—vats, tanner's tools, leather, &c., to the present plaintiff, the deed containing a proviso that the goods should remain in the mortgagor's possession to enable him to finish tanning the leather. While in the possession of the mortgagor under the agreement, the goods were levied upon to satisfy a judgment obtained against the mortgagor by a third person. The sheriff had notice of the mortgage one day prior to the sale. It was held that, as there had been no delivery of the mortgaged property to the mortgagee, the mortgage though good as between the parties was void as to creditors, the possession of the mortgagor being fraud *per se*. But in the course of a careful opinion, Judge GIBSON said: "I can see no objection to an absolute sale of an article undergoing manufacture to be delivered when finished. * * * If, however, the transactions were industriously kept secret, it would amount to actual fraud." The fatal defect in *Clow* v. *Woods*, and that upon which Judge GIBSON bases his decision, is that the mortgaegd goods were not scheduled. Judge DUNCAN, who also delivered an opinion in the same case, discusses the question as to whether retention of possession under such circumstances is fraud *per se*, or merely a badge of fraud to be considered by the jury. He says, "The distinction courts have taken is, between a deed purporting on its face to be an absolute deed, so

that the separation of the title from the possession is incompatible with the deed itself, and a deed upon condition, which does not entitle the vendee to possession. An absolute deed without possession is in point of law fraudulent. When possession is inconsistent with the deed, it is a fraud in itself to be determined by the court." This is a strong, indeed, a direct, implication, that where the agreement and the possession are compatible, fraud is a question for the jury. *Babb* v. *Clemson*, 10 S. & R. 419, also cited by Judge TILGHMAN, was a suit against the sheriff for the value of certain goods levied on by him. The plaintiff's claim was based upon an assignment of the goods to her by the defendant in the execution prior to the levy. The defendant remained in possession after the assignment. The point decided is correctly stated in the syllabus, as follows: If the owner continue in possession after an absolute assignment of the goods, it is a fraud *per se*, unless the possession is according to some conditions or trust expressed in the deed. It is upon these two cases that the decision in *Martin* v. *Mathiot* rests, and with every respect for so able and learned a jurist as Judge TILGHMAN, they can hardly be said to warrant it. Especially in view of the earlier law in Pennsylvania, which was much less strict with regard to fraudulent possession than that in England: *Dawes* v. *Cope*, 4 Binn. 258; *Levy* v. *Wallis*, 4 Dall. 197; *Waters* v. *McClellan*, Id. 208; *Chancellor* v. *Phillips*, Id. 213; *Wilt* v. *Franklin*, 1 Binn. 502. *Martin* v. *Mathiot* practically avoids the payment of money as a condition precedent to the vesting of property in the vendee, as to purchasers and creditors, where possession has been given him. Neither *Clow* v. *Woods*, nor any of the earlier authorities, sustain this. All of them except from the rule as to fraudulent possession cases where there is a condition expressed in the deed, even though as a matter of fact the possession is equally deceptive in both cases. The early authority most nearly in point which I have been able to find is *Murgatroyd* v. *Crawford*, *supra*, with which *Martin* v. *Mathiot* certainly does not agree. A strikingly similar case arose some years later, where there had been an agreement to sell a boat, with the condition that it should remain the vendor's property until the instalments were paid. The vendee was in the employ of the vendor as boatman. Some of the instalments had been paid, and the vendee was in possession. The creditors of the vendee levied upon the boat, and the court below, upon the authority of *Martin* v. *Mathiot*, pronounced the agreement a fraud *per se*, as to the vendee's creditors. This judgment was reversed, Judge GIBSON distinguishing *Martin* v. *Mathiot*, upon the ground that in the present case, the possession of the vendee, since he was in the vendor's employ, was the possession of the vendor, and therefore not delusive: *Lehigh Co.* v. *Field*, 8 W. & S. 241.

It seems decided beyond question, in Pennsylvania, that where there is a present sale and delivery, no agreement to continue the property in the vendor, or to preserve his lien, will avail: *Jenkins* v. *Eichelberger*, 4 Watts 121; *McCullough* v. *Porter*, 4 W. & S. 178; *Trovillo* v. *Shingles*, 10 Watts 438; *Pritchett* v. *Cook*, 62 Penn. St. 193. The difficulty is in determining what is and what is not a present sale. It was found that to apply the doctrine of *Martin* v. *Mathiot* to all cases of the kind would work injuriously, and before long there appear two lines of cases, one governed by *Martin* v. *Mathiot*, and limited to cases where there is a delivery to the vendee with retention of title by the vendor simply for his security or convenience, and the other composed of those cases wherein there appears to have been some further motive for the delivery, either that the

vendee should have the *use* of the property as bailee for hire, with a right to buy absolutely at the end of the time, or continue in possession as the servant or agent of the vendor with the right to pay for and become owner of the property at a future time. The cases just cited are examples of the first line, and to them may be added *Stadfeldt* v. *Huntsman* and *Brunswick* v. *Hoover*, *supra*. The distinction between the two lines is clear enough in principle, but as before remarked, the difficulty arises when it is proposed to apply the principle to given circumstances. *Martin* v. *Mathiot* and kindred cases would seem to stamp as illegal, or more properly, void as to third persons, any contract no matter how worded, which gives the vendee possession, and retains the ownership in the vendor for his security or that of the vendee. It has also been held in several cases, beginning with *Myers* v. *Harvey*, 2 P. & W. 478, that property bought at sheriff's sale may be left with the defendant, *loaned* or *hired*, without subjecting to sale again as his property. But where there is an *agreement to resell* it to the defendant, be the sale conditional or absolute, his creditors may again sell it: *Heitzman* v. *Divil*, 11 Penn. St. 264; *Dick* v. *Cooper*, 24 Id. 217; *Waldron* v. *Haupt*, 52 Id. 408.

The case of *Clark* v. *Jack*, 7 Watts 375, may be said to begin the line of cases held not within the principle of *Martin* v. *Mathiot*. The agreement was: "Articles of agreement made and concluded this 4th day of June, in the year of our Lord 1836, between William Jack of the one part and Richard Arthurs and C. J. Durham of the other part, witnesseth, that in consideration of $145 paid Lewis P. Durham for the said Jack, in hand by the said Arthurs and Durham, the said Jack agrees to sell two years from this date unto the said Arthurs and Durham all of the law library which the said Jack bought of Lewis P. Durham. And the said Arthurs and Durham agree to pay a certain judgment bond in which said Jack, Arthurs and Durham are jointly bound unto the said L. P. Durham for the sum of $200 with interest, which payment shall be in full satisfaction of the said books. And further, the said Jack agrees to let the said Arthurs and Durham have the use of the said books until that time, and the said books not to be taken out of Brookville, Jefferson Co." This was held a bailment, with a superadded contract to sell, and the possession in no wise fraudulent. So in *Rose* v. *Story*, 1 Penn. St. 190, where the agreement was for the sale of horses to be paid for in instalments (several of which had been paid), the animals to remain the property of the vendor until final payment, the contract was held valid as against the vendee's creditors on the ground that as he was in the employ of the vendor, and continued to use the horses in his work about the premises, there was nothing deceptive in his possession. See also *Lehigh Co.* v. *Field*, *supra*. In *Rowe* v. *Sharp*, 51 Penn. St. 26, the agreement was a lease of billiard tables for a certain period, lessee to redeliver them in good condition, lessors to make out a bill of sale at the end of the term if there had been no default in paying the instalments of rent. Three days prior to the execution of the lease, the lessee agreed to purchase the tables of the lessor for $750. He paid cash $200, and the balance $550 was the amount mentioned as the total rent in the lease. A bill of sale was made out at the time of the agreement to purchase, though not signed. This case affords a curious example. No one can fail to see that the effect and intention of the lease were simply the security of the vendor. Yet the agreement was held lawful, and the delivery to the lessees or vendees simply a bailment, upon the authority of *Clark* v. *Jack*, *supra*. *Rowe* v. *Sharp* is upon the border line, and is hardly sustained, certainly not ruled, by *Clark* v. *Jack*

Enlow v. *Klein*, 79 Penn. St. 488, is also an important case. The agreement was that Enlow should "furnish" Moritz with horses, wagons, &c., suitable for peddling. Moritz to pay him $5 per week for two hundred weeks, the property to belong to and be managed by Enlow until the last payment. Moritz to keep the articles in repair, and replace any horse which might die. Enlow to relinquish all right to the property at the last payment. Delivery to Moritz under this agreement was held a bailment, the word "furnish" implying that the property was loaned or hired with a superadded agreement to sell at a future day. The case is said to be within the principle ruled in *Rose* v. *Story*, *supra*, that where payment is to be for the use of a thing, with an agreement for a future sale, the contract is valid. *Rose* v. *Story* is several times cited as authority for this proposition, but it decides nothing of the kind. There was not the slightest agreement for the use of the property, nor was it pretended that there was. The proposition is enunciated gratuitously in the syllabus, but the decision rested, as shown above, on the ground that the vendee was in the employ of the vendor. This is recognised as the "pivot" of the case in *Euwer* v. *Van Geisen*, 6 Weekly Notes Cases 364.

The two recent cases referred to at the beginning of this note show a strong disposition to extend the doctrine of *Martin* v. *Mathiot*; *Stadfeldt* v. *Huntsman* closely resembled *Rowe* v. *Sharp* and *Enlow* v. *Klein*. The difference was verbal—in the "label." In *Rowe* v. *Sharp* there had been a nominal lease. In *Enlow* v. *Klein*, a lease by implication. In *Stadfeldt* v. *Huntsman*, the contract was practically the same, but expressed simply as an agreement to pay in instalments, with a right in the vendor to take away the goods upon default. The case is distinguished from *Rowe* v. *Shar* , because there was no lease in terms, nor was anything said as to re-delivery. Nothing was said as to re-delivery in *Enlow* v. *Klein*, but there was an implied lease. Here there was none. *Brunswick* v. *Hoover* is even more on all fours with *Rowe* v. *Sharp*. The draftsman of the contract, probably having the latter case in mind, made the agreement in the form of a sale in instalments, to be secured by lease. Subsequently, a lease was executed by vendors to vendees, without, however, containing in terms an agreement to re-deliver. This arrangement the court pronounced truly a "thin disguise," "too clumsy to have the merit of being clever," and held the transaction a sale, concluding their opinion by saying: "There is not the slightest element of bailment in the transaction. It is immaterial what the parties call it, the law pays little attention to the label; it looks beneath and examines the nature of the contract between the parties." It must be confessed that this language is hard to reconcile with *Rowe* v. *Sharp* and *Enlow* v. *Klein*. No one can suppose for a moment that an actual re-delivery of the tables was contemplated in *Rowe* v. *Sharp*, especially in view of the evidence of a sale prior to the lease. It was the "label" and only the label at which the court looked in that case. And the true difference between it and *Brunswick* v. *Hoover*, is that the agreement was cleverly drawn in the one case and clumsily in the other. The disguise is equally evident in both. There was no agreement whatever for a re-delivery in *Enlow* v. *Klein*, and though the facts of that case are not so nearly in point as in *Rowe* v. *Sharp*, both cases show a tendency toward forsaking the doctrine of *Martin* v. *Mathiot*—a tendency directly the reverse of *Stadfeldt* v. *Huntsman* and *Brunswick* v. *Hoover*. It is greatly to be regretted that *Martin* v. *Mathio* should be returned to in the face of the requirements of modern convenience, and when Judge TILGHMAN'S assertion

in that case that such agreements "are not in the usual course of business," is certainly no longer true, if it ever was.

I have reviewed at length the Pennsylvania law, in order to show the fallacy of the rule lately returned to, so strongly evidenced by the constant exceptions to the rule made from time to time, and the final gradual tendency to relinquish it altogether, until it was restored by the two last cases. The following are interesting cases in Pennsylvania: *Chamberlain* v. *Smith*, 44 Penn. St. 431; *Becker* v. *Smith*, 59 Id. 469; *Henry* v. *Patterson*, 57 Id. 346; *Haak* v. *Linderman*, 64 Id. 501; *Stiles* v. *Whitaker*, 1 Phila. 271; *Farrell* v. *Nathans*, Id. 557; *Henkels* v. *Brown*, 4 Id. 299; *Crist* v. *Kleber*, 79 Penn. St. 290; *Hepple* v. *Speakman*, 7 Phila. 119; *Price* v. *McCallister*, 3 Grant's Cas. 248.

In New York, the question has arisen with great frequency, and the decisions are not all reconcilable, but the later ones are opposed to the late Pennsylvania decisions, and hold that the vendee in such cases takes no title, nor do his creditors, or *bona fide* purchasers from him, until he has paid the price, upon which, in the agreement, his acquisition of title depends: *Wait* v. *Green*, 36 N. Y. 556, was in accord with the rule in Pennsylvania, and was for some time followed. There was no condition in the original agreement in that case, but at the time of delivery the condition was annexed; and *Ballard* v. *Burgett*, 40 N. Y. 314, and *Austin* v. *Dye*, 46 N. Y. 500, are distinguished by Judge RAPALLO in *Comer* v. *Cunningham*, 77 N. Y. 391, on the ground that where the original contract is absolute and the delivery conditional, the doctrine of *Wait* v. *Green* would apply, but where the original contract is conditional, the rule would be different. But this distinction can hardly be maintained: *Smith* v. *Lynes*, 1 Seld. 41. And *Wait* v. *Green* may now be considered not law, as the judge who delivered the opinion in the case, says, in a note to the reporter in 20 How. Pr. 530, that "the heresy of that case should not be perpetuated"—he and his colleagues being now convinced that their decision had been erroneous. The vendee must not, however, be empowered by the contract to do anything inconsistent with his imperfect title. If, therefore, the contract contains a provision that the vendee may resell the goods, a purchaser from him will be protected, though the price be not paid the original vendor: *Fitzgerald* v. *Fuller*, 19 Hun 180; *Ludden* v. *Hazen*, 31 Barb. 650; *Cole* v. *Munn*, 3 T. & C. 380. The cases of *Moss* v. *Boon*, 70 N. Y. 465; *Comer* v. *Cunningham*, 77 Id. 391; *Ballard* v. *Burgett*, 40 Id. 314; *Austin* v. *Dye*, 46 Id. 500, may be considered as settling the law in New York and establishing the validity of such contracts even as to *bona fide* purchasers and creditors.

In New Jersey, the law coincides with that of New York, although the question does not seem to have arisen until recently, and I have been able to find but one case on the point: *Cole* v. *Berry*, 13 Vroom 308. The authorities are cited, and the Pennsylvania doctrine noticed and pronounced against the weight of authority, in an able opinion by DEPUE, J.

The Delaware reports contain no adjudication upon the question.

Of the New England states, in Maine the courts go pretty far in opposition to the Pennsylvania doctrine. The validity of such contracts as against *bona fide* purchasers and creditors is beyond question established: *Sawyer* v. *Shaw*, 9 Me. 47; *Whipple* v. *Gilpatrick*, 19 Me. 427; *Tibbetts* v. *Towle*, 12 Id. 341; *Porter* v. *Foster*, 20 Id. 391; *Leighton* v. *Stevens*, 22 Id. 252; *Hotchkiss* v. *Hunt*, 49 Id. 213; *Rawson* v. *Tuel*, 47 Id. 506; *Sawyer* v. *Fisher*, 32 Id. 28; *Brown* v. *Haynes*, 52 Id. 578; *Everett* v. *Hall*, 67 Id. 497; *Rogers* v. *Whitehouse*, 71 Id. 222. So different is the view taken

by the court of Maine from that of Pennsylvania, that an agreement that goods shall be returned or paid for on a day certain, with or without a provision that in case of their return, rent shall be paid for them, will pass the title in Maine, and will not in Pennsylvania: *Dearborn* v. *Turner*, 16 Me. 17; *Buswell* v. *Bicknell*, 17 Id. 344; *Perkins* v. *Douglass*, 20 Id. 317. And so firmly established is the principle, that a man may annex what conditions he chooses to the sale of his property, that in a case where A. negotiated with B. for the sale of goods, and C. at A.'s request paid for them on the condition that he was to be owner until repaid, and the goods were delivered to A. and C. jointly, a *bona fide* purchaser from A. was not protected as against C., even though B. supposed that he was selling the goods to A.: *Tainter* v. *Lombard*, 53 Me. 369. And where property is sold to remain the vendor's until wholly paid for, if the vendee sell the property after partial payment, the purchaser is not entitled to deduct this payment in an action of trover by the original vendor. The contract and delivery give the vendee no right to sell the property until the condition is absolutely performed: *Brown* v. *Haynes*, *supra*. The condition is not illegal or void, even though the vendee be given a right to sell the goods. While the vendor, under such circumstances, cannot recover from purchasers to whom the goods have been properly sold, he can from the vendee or his assignee for the benefit of creditors: *Rogers* v. *Whitehouse*, *supra*. But strong as is the tendency of the Maine cases toward protecting the vendor in conditional sales, when it can be shown that the sale has once been complete by the performance of the condition, no acknowledgment by the vendee that the property is still the vendor's will avail against *bona fide* purchasers or creditors: *George* v. *Stubbs*, 26 Me. 243.

In New Hampshire the same rule prevails, and such contracts are valid: *Fisk* v. *Ewen*, 46 N. H. 173; *Kimball* v. *Jackman*, 42 Id. 242; *Dudley* v. *Sawyer*, 41 Id. 326. And in that state, where nothing is said as to payment and delivery, there is an implied condition that the price shall be paid before the property shall vest, simple delivery not being conclusive evidence of the waiver of the condition: *Ferguson* v. *Clifford*, 37 N. H. 87. If the contract be that the vendee shall pay for the article or for its use, and before the day fixed he sells his interest to a purchaser with notice, the latter may tender the original vendor the price and acquire the property. But the property does not pass to the original vendee so as to enable him to confer title on a subsequent purchaser. His interest is equitable merely: *Sargent* v. *Gile*, 8 N. H. 325; *Bailey* v. *Colby*, 34 Id. 29; *Esty* v. *Graham*, 46 Id. 169. If the property has become part of land, as rails on a railroad, subsequent purchasers and mortgagees of the land will be protected; *Haven* v. *Emery*, 33 N. H. 66.

The Vermont cases establish the same general rule. In that state, until 1854, when the law was so far altered by statute, an attaching creditor of the vendee, or a purchaser from him, could not, even by a tender of the price and interest, defeat the vendor's right to maintain trover: *Bigelow* v. *Huntley*, 8 Vt. 151; *Bradley* v. *Arnold*, 16 Id. 382; *Smith* v. *Foster*, 18 Id. 183; *Buckmaster* v. *Smith*, 22 Id. 203; *Martin* v. *Eames*, 26 Id. 476; *Child* v. *Allen*, 33 Id. 476; *Hurd* v. *Fleming*, 34 Id. 169; *Burnell* v. *Marvin*, 44 Id. 277; *Duncan* v. *Stone*, 45 Id. 118. Where, however, the recovery of the vendor would really enure to the benefit of the vendee, the rule does not apply. A distinction is taken between conditional sales, by their terms permitting the conditional vendees to resell the goods, and those simply permitting him to consume them. The former are not good against

purchasers without notice—the latter are: *Armington* v. *Houston*, 38 Vt. 448.

The same general rule obtains in Rhode Island: *Goodell* v. *Fairbrother*, 12 R. I. 233.

In Massachusetts there have been some interesting applications of the rule. It was held in *Fairbank* v. *Phelps*, 22 Pick. 535, that where the condition remained unbroken, the vendor could not maintain trover without previous demand for the price or the goods, as his right of possession was wanting. But the validity of such contracts is well established, and it has not been necessary that the condition should be very clearly expressed, at least as against the vendee's creditors: *Hill* v. *Freeman*, 3 Cush. 257; *Heischorn* v. *Canney*, 98 Mass. 149; *Armour* v. *Pecker*, 123 Id. 143. And the distinction hinted at in *Hill* v. *Freeman*, between creditors and *bona fide* purchasers, has been done away with in the case of *Coggill* v. *Railroad Co.*, 3 Gray 545, a leading case on the subject in Massachusetts, and, indeed, elsewhere, as it is frequently and approvingly cited in other states. It does not affect the case that the seller knew the buyer to be a dealer in the kind of goods sold, nor will an understanding that the goods are to be placed in the vendee's shop for sale enable a purchaser of the *whole stock* to hold it against the original vendor: *Sargent* v. *Metcalf*, 5 Gray 306; *Burbank* v. *Crooker*, 7 Id. 158. In general, see cases already cited, and *Gilbert* v. *Thompson*, 3 Gray 550, note; *Blanchard* v. *Child*, 7 Id. 155; *Deshon* v. *Bigelow*, 8 Id. 159; *Zuchtmann* v. *Roberts*, 109 Mass. 53; *Benner* v. *Puffer*, 114 Id. 376. It is no defence to an action of replevin by the seller, that the defendant lent the original vendee part of the money paid, and afterwards tendered the remainder of the agreed price to the seller: *Chase* v. *Pike*, 125 Mass. 117. But if the vendee sells the property before all the money is paid, and afterwards tenders the rest of the money, this will confirm the title of the purchaser from him: *Day* v. *Bassett*, 102 Mass. 445; *Currier* v. *Knapp*, 117 Id. 324. And a conditional vendee, even after condition broken, may maintain trover for the goods against a person becoming wrongfully possessed of them: *Harrington* v. *King*, 121 Mass. 269.

Such contracts have met with the same construction in Connecticut, a fact which is not a little remarkable in a state where the doctrine of fraudulent possession is so strongly adhered to: *Forbes* v. *Marsh*, 15 Conn. 384; *Hart* v. *Carpenter*, 24 Id. 427. They are looked upon as agreements for a future sale, or as bailments: *Tomlinson* v. *Roberts*, 25 Conn. 478; *Hughes* v. *Kelly*, 40 Id. 148; *Brown* v. *Fitch*, 43 Id. 512. And in the principal case the court has followed the Massachusetts cases, in holding that the giving of authority to the vendee to dispose of the goods before payment will not necessarily invalidate the condition.

In the South and Southwest, the adjudications upon the point are not numerous. In many of the states, statutes have been passed within the last few years requiring contracts of the kind to be filed and recorded. No cases appear in Virginia, West Virginia, Florida and Texas. In the two Virginias, a statute was passed in 1873 of the kind just mentioned, and in Texas a similar statute was passed in 1879. A dictum in accord with the Pennsylvania rule appears in *Carroll* v. *Wiggin*, 30 Ark. 402, and in *Butler* v. *Gannon*, 53 Md. 333. The law in Kentucky corresponds with that in Pennsylvania, and the same doctrine was adopted by the Supreme Court of Alabama in *Sumner* v. *Woods*, 52 Ala. 94; *Dudley* v. *Abner*, Id. 572; *Leigh* v. *Railroad*, 58 Id. 165, but the contrary doctrine has been recently enunciated in *Fairbanks* v. *Eureka Co.*, 2 South. L. J. (N. S.) 465; see, also, *Holman* v. *Lock* 51 Ala. 287. North

and South Carolina, Georgia, Mississippi and Tennessee recognise the validity of conditional sales, as to all parties. In South Carolina, the condition is void if verbal, by Act of 1843: *Talmadge* v. *Oliver*, 14 S. C. 524, and cases cited. In *Woods* v. *Burrough*, 2 Head 207, a distinction is taken between the reservation of lien and the reservation of ownership. The former is invalid, unless done under certain forms. The latter is perfectly valid. This case affords an admirable illustration of the fact that *lien* and *ownership* or *property* are distinct. Lien is too often regarded as a remnant of the right of property —such is not the case, and the distinction is of great importance. It forms the fundamental difference between cases where the vendee has and has not the title. If lien only is reserved, the ownership is gone from the vendor to the vendee by the very terms of the agreement, and the result is, of course, entirely different. The accidental loss of the thing sold must be borne by the conditional vendee: *Bank* v. *Vandyck*, 4 Heisk. 617. This point is, however, left undecided in Georgia: *Bentley* v. *Johnson*, 63 Ga. 661. In Georgia, resale by a conditional vendee is a conversion, and the vendor may sue in trover at once, although the time for payment has not yet arrived: *Sims* v. *James*, 62 Ga. 260. See, generally, *Ballew* v. *Sudderth*, 10 Ired. 176; *Parris* v. *Roberts*, 12 Id. 268; *Ellison* v. *Jones*, 4 Id. 48; *Smith* v. *Sasser*, 5 Jones 388; *Talmadge* v. *Oliver*, 14 S. C. 524; *Houston* v. *Dyche*, Meigs 76; *Gambling* v. *Read*, Id. 281; *Price* v. *Jones*, 3 Head. 84; *Holmark* v. *Molin*, 5 Cold. 482; *Bradshaw* v. *Thomas*, 7 Yerg. 497; *Ketchum* v. *Brennan*, 53 Miss. 596; *Vaughn* v. *Hapson*, 10 Bush 338; expressly overruling *Patten* v. *McCane*, 15 B. Mon. 558; *Greer* v. *Church*, 13 Bush 430; *Goodwin* v. *May*, 23 Ga. 205; *Flanders* v. *Huguenin*, 58 Ga. 56.

The law of Ohio is opposed to the Pennsylvania doctrine: *Carmack* v. *Gordon*, 2 Cin. S. C. R. 408.

So in Indiana: *Hanway* v. *Wallace*, 18 Ind. 377; *Dunbar* v. *Rawle*, 28 Id. 225; *Bradshaw* v. *Warner*, 54 Id. 58; *Thomas* v. *Winters*, 12 Id. 322; *Hodson* v. *Warner*, 60 Id. 214; *McGin* v. *Sell*, 60 Id. 249. In *King* v. *Wilkins*, 11 Ind. 349, it was said that the vendor could not set up his title as against a creditor who had trusted the vendee on the faith of the goods. But this is disapproved in *Bradshaw* v. *Warner*, *supra*. Mere endorsement of a note for the payment of the price, containing a stipulation that the article is to remain the vendor's until full payment, will not vest the property in the endorsee so as to enable him to maintain replevin against the vendee. It is doubtful whether the vendor's reservation of property is assignable: *Domestic S. M. Co.* v. *Arthurhultz*, 63 Ind. 322.

The Pennsylvania doctrine obtains in Illinois: *Ketchum* v. *Watson*, 24 Ill. 592; *McCormick* v. *Hadden*, 37 Id. 370; *Murch* v. *Wright*, 46 Id. 487. And the case of *Lucas* v. *Campbell*, 88 Id. 447, would seem to go further and to suggest that as between the parties, the property is in the vendee (see pages 450, 451), but the question in the case was as to the vendee's attaching creditor. This case is an example of the prevalent manner of drawing contracts for the sale of sewing machines on the instalment plan; such a contract is held to be a sale in Illinois: *Latham* v. *Sumner*, 89 Ill. 234. In *Young* v. *Bradley*, 68 Id. 557, it is broadly stated that the law of Illinois is, that a delivery of personalty under a contract of sale by an unpaid vendor to a vendee passes the title, as to innocent purchasers, irrespective of the particular terms of the contract or the intention of the parties: *Jennings* v. *Gage*, 13 Ill. 610; and *Brundage* v. *Camp*, 21 Id. 330, are leading authorities for this proposition. A careful

perusal of them, particularly the earlier one, will show that, as applied to these facts, they hardly go so far. Subsequent cases, however, clearly establish the law as above stated: *Sibley* v. *Tie*, 88 Ill. 287; *M. C. Railroad Co.* v. *Phillips*, 60 Id. 190.

The opposite rule prevails in Michigan: *Couse* v. *Tregent*, 11 Mich. 65; *Dunlap* v. *Gleason*, 16 Id. 158; *Whitney* v. *McConnell*, 29 Id. 14.

In Wisconsin, the Act of 1873 makes all agreements of the kind void as to creditors, unless properly filed and recorded. It is doubted in *Kimball* v. *Post*, 44 Wis. 471, whether if the agreement takes the form of a lease it is within the statute, but the court incline strongly to the opinion that it is.

A like statute was passed the same year in Minnesota. The case most nearly in point is *McClelland* v. *Nichols*, 24 Minn. 176.

In Iowa the validity of these contracts was recognised by the courts, although originally with one dissent out of three judges: *Bailey* v. *Harris*, 8 Iowa 331; *Robinson* v. *Chapline*, 9 Id. 91; *Baker* v. *Hall*, 15 Id. 277; *Knoulton* v. *Redenbaugh*, 40 Id. 114; *Mosely* v. *Shattuck*, 43 Id. 540. By Act of 1872, Code, sect. 1922, sales of this kind must be in writing and recorded to avail against creditors and purchasers, and the recording must be with due promptness: *Pash* v. *Weston*, 52 Iowa 675. The act is not retrospective: *Knowlton* v. *Redenbaugh*, *Mosely* v. *Shattuck*, *supra*.

There have been one or two remarkable rulings in Missouri recently. The cases of *Parmlee* v. *Catherwood*, 36 Mo. 479; *Griffin* v. *Pugh*, 44 Id. 326; *Little* v. *Page*. Id. 412; *Ridgway* v. *Kennedy*, 52 Id. 24, settled the law of that state in opposition to the Pennsylvania doctrine. In 1877 the legislature passed an act avoiding such sales as to third persons unless recorded, etc. (Sect. 2507, R. S.) Since then, *Robbins* v. *Phillips*, 68 Mo. 100; *Wangler* v. *Franklin*, 70 Id. 659; *Sumner* v. *Cottey*, 71 Id. 121; *Dwyer* v. *Denny*, 6 Mo. App. 578; *Willard* v. *Sumner*, 7 Id. 577, have been decided, and the doctrine of *Parmlee* v. *Catherwood* distinctly reiterated. The cases of *Robbins* v. *Phillips* and *Sumner* v. *Cottey* arose before the passage of the act. It is not stated when the facts of the other cases occurred; but the rule is reiterated in the strongest way, record is pronounced unnecessary, and the Act of 1877 not even alluded to. The only statutory enactment mentioned is sect. 5, p. 280, 1 Wag. Stat. (1870), which was less express, and held not to apply. There is doubtless some reason for this apparent direct conflict, but it is perplexing, at least, to the outside reader.

These contracts are valid in Kansas: *Hall* v. *Draper*, 20 Kans. 137.

An act passed in 1877 in Nebraska requires conditional sales to be recorded, etc.; prior to that time they were held valid: *Aultman* v. *Mallory*, 5 Neb. 180. They are valid in California, Oregon and Nevada: *Kohler* v. *Hayes*, 41 Cal. 455; *Singer Manuf. Co.* v. *Graham*, 8 Oregon 17; *Cardinal* v. *Edwards*, 5 Nevada 36. The question has not been before the courts of Colorado.

Two recent decisions in point appear in the United States Supreme Court Reports: *Hervey* v. *Locomotive Works*, 3 Otto 664, where the case arose in Illinois, and in conformity with the law of that state, as shown above, the contract was held invalid as to third persons without notice, and *Heryford* v. *Davis*, 12 Otto 235, a case which arose in Missouri, and in which the contract was held invalid as not having been recorded under the chattel mortgage acts of that state. The facts occurred before 1877, so that the statute of that date would not apply; but counsel, arguendo, asserted that the law "was, and now is," that such contracts are per-

fectly valid in Missouri. Justice BRADLEY dissents strongly, and advocates the liberal construction of contracts of this nature, and his views are certainly borne out by the increasing number of conditional sales in various forms, of which the "instalment plan" of selling sewing machines, and "car trusts," are examples. Such contracts bid fair to become quite as much in the usual course of business as the long-recognised contracts of hiring, bailments for storage, etc. And no reason can be shown why the possession is more or less deceptive in the one case than in the other. The great weight of authority, as we have seen, is against the last two Pennsylvania cases, and it is to be hoped that the Supreme Court of that state will not long continue to occupy its present nearly unique position.

LUCIUS S. LANDRETH.

United States Circuit Court, District of Minnesota.

SONSTIBY *v.* KEELEY.

In cases of conflict between the decisions of the federal courts and those of the state courts, the former will, even on questions of commercial law, follow the decisions of the state courts if it appears that, by reason of the situation of the parties and of the subject-matter, a contrary ruling would subject a party to a double payment of the same debt, without the possibility of relief from the federal courts.

In a suit in a federal court, a sale made in Minnesota was attacked on the ground of the vendor's fraud, and it appeared that part of the consideration was an agreement by the vendee to assume the payment of a debt of the vendor to a third person, which agreement would, under the rulings of the Minnesota courts, render the vendee liable to such third person therefor. *Held*, that the federal court would treat the assumption of such debt as a valid consideration.

Whether, in an action at law involving the validity of a sale, the court can apply the equitable principle that an innocent vendee who, subsequent to the sale, has received notice of the vendor's fraud will be protected only to the extent of the portion of the consideration paid prior to the receipt of such notice: *Quære.*

MOTION for a new trial.

This was an action at law arising out of a sale of certain property by one Forbes to the plaintiff, and its subsequent seizure as the property of Forbes under attachment proceedings. It appeared that, prior to September 1878, Forbes was the owner of a stock of dry goods in a store at Waseca, Minnesota. On the 17th of that month he executed a bill of sale of said stock of goods to the plaintiff, and delivered to him possession. This was done by virtue of an agreement of sale, made without any fraudulent intent on the part of plaintiff, and without any knowledge by him of any such intent on the part of Forbes, by which agreement plaintiff paid Forbes for the goods $3000 in cash, and assumed the payment of certain debts held by a bank in Waseca against Forbes, amounting to about $3800. This agreement was made, or at least